Filed 6/8/17 In re A.B. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.B. et al., Persons Coming Under the Juvenile Court Law.	B278551 (Los Angeles County Super. Ct. No. DK18260)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DIANA B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Lisa R. Jaskol, Judge. Affirmed.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

The dependency court sustained a Welfare and Institutions Code[1] section 300 petition, finding jurisdiction over and removing twin infant daughters A.B. and E.B. (collectively, the infants) from the custody of their mother Diana B. (Mother) and father Michael C. (Father),[2] and placing them in the custody of their maternal grandmother (MGM) after first placing them with Mother and Father. Mother appeals, contending the evidence is insufficient to support the trial court's finding that there were no reasonable means other than removal by which the infants' well-being could be protected.[3] We determine there is substantial evidence to support the dependency court's determination, and affirm.

COMBINED STATEMENT OF THE CASE AND FACTS

1. Birth of the Infants and Initial Investigation

Mother gave birth to A.B. and E.B. in April 2016. The infants were born prematurely and placed in the neonatal intensive care unit (NICU). Mother and the infants tested positive for marijuana at their birth. A reporting party advised the Los Angeles County Department of Children and Family Services (DCFS) of these circumstances four days later. Mother had told the reporting party that she possessed a recently expired marijuana card, and had continued using marijuana on a daily basis to treat her nausea during her pregnancy, and did so without informing her doctor.

Mother was discharged from the hospital on April 27, 2016; the infants remained in the NICU. A DCFS children's social worker (CSW) visited the

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 Father is not a party to this appeal.

3 Mother's notice of appeal relates to "all orders" of October 13, 2016; however, on appeal Mother challenges only the removal order.

hospital on April 28, 2016, to investigate the referral, then learning Mother had been discharged the previous day and that both before and after discharge she was visiting the infants in the NICU daily and interacting appropriately with them. The CSW also learned the infants had each weighed 2.2 pounds at birth and would likely remain in the NICU for 10 additional weeks, until the date they would have been born at full term (40 weeks).

The CSW interviewed Mother at home, also on April 28, 2016. Mother, now age 36, reported she began drinking alcohol and smoking cigarettes at age 13, tried methamphetamine in high school, had a heroin addiction for two years starting when she was 21, had a prior arrest for growing marijuana in her home, a prior DUI conviction, and had been involved in a prior relationship involving domestic violence fueled, in part, by her alcohol abuse. Mother denied she used marijuana daily and said she only took a "hit" during pregnancy when she felt nauseous, and had not smoked marijuana since the morning she gave birth to the infants. It was determined her substance abuse issues had continued over a period of 23 years. Mother's parents were interviewed and stated they had no knowledge of Mother's substance abuse and had no concerns about Mother's ability to care for the infants.

On May 2, 2016, the CSW spoke with Father,[4] who reported he had not been aware Mother was smoking marijuana during pregnancy but was "not surprised." He stated that at the time she got pregnant she was taking "harder" drugs such as Oxycontin, Norco and morphine, but denied ever

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[4] Mother was not certain of the father of the infants. Based on DNA test results, the court determined Michael C. to be the father.

witnessing her ingest them. He inferred her use from the fact she told him she was going to "wean herself off slowly."[5]

On May 6 and June 10, 2016, Mother tested negative for drugs. The infants were discharged from the hospital into the care of Mother and Father in June 2016.

2. The Non-Detention Section 300 Petition

On July 11, 2016, DCFS filed a non-detention section 300 petition relating to the infants, doing so based on Mother's 23-year history of drug and alcohol abuse, including her prior use of heroin, and her use of marijuana throughout her pregnancy. DCFS alleged that, when born, the infants had tested positive for marijuana, and the family had a "'[h]igh' risk for future abuse and neglect." DCFS also alleged Father knew of Mother's drug use and had failed to protect the infants; Father had a history of alcohol abuse, mental and emotional disorders and had failed to take medication as prescribed. These conditions and behaviors rendered him incapable of providing the infants with regular care and supervision. DCFS further alleged these allegations endangered the infants' physical health and safety; and recommended court supervision and services for the family but that the infants remain in the custody of Mother and Father.

At the detention hearing on July 11, 2016, the court released the infants to the parents and ordered Mother to continue drug and alcohol testing, and not to breastfeed the infants unless approved by DCFS. Both parents were ordered not to consume or be under the influence of drugs or alcohol. The family was also referred to Family Preservation Services, and the court set an adjudication hearing for October 13, 2016.

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[5] Mother and Father were not married to each other and did not live together at the time of the infants' conception or birth, or during the proceedings in the juvenile court.

3. Events and Investigation Following Hospital Discharge of the Infants

Subsequent to the detention hearing, and after the infants had been discharged from the hospital into her care, Mother provided a "diluted" drug and alcohol test result on July 14, 2016. Mother provided DCFS with a second "diluted" drug and alcohol test result on August 9, 2016.

On August 25, 2016, Mother enrolled in an outpatient alcohol and drug rehabilitation program. On August 29, 2016, Mother contacted DCFS and reported she had taken a non-prescribed Xanax pill on August 25, 2016, after feeling overwhelmed by her infant twins, the court orders, and having to participate in programs, but stated she vomited up the Xanax that same evening because she was scheduled for drug testing. Father was present when this happened.

On September 13, 2016, Father reported in a meeting with a CSW that Mother had contacted him on September 10, 2016, and "begged him" to bring beers, which he did because he wanted to visit the infants. He stated he brought beer to Mother's home and observed Mother consume six beers and then pick up A.B. and begin breastfeeding her. Father ultimately became angry with the CSW and left the interview room, "refusing to speak further with [the] CSW."

On September 14, 2016, when DCFS made an unannounced visit to her home, Mother admitted that Father had brought beers to her house, stated they had consumed them together, and denied breastfeeding A.B. The CSW found no alcohol in the house, but did find a large amount of frozen breast milk Mother stated she was saving to provide to the infants if or when DCFS liberalized its breastfeeding order. Mother tested negative on September 14, 2016, for all substances, including alcohol.

4. The DCFS Removal Warrant and Detention Application

On September 16, 2016, DCFS applied for and was granted a removal warrant authorizing removal of the infants from parental care.

On September 21, 2016, DCFS filed an ex parte application under section 385 asking that the infants remain detained, that the prior placement of the infants in Mother's and Father's home be vacated effective September 16, 2016, and that the infants be placed in the home of MGM. The court granted the requests. On the same date, Father reported Mother had used opiate pills during the first five to six weeks of her pregnancy and that Mother had been an opiate abuser for the past 11 years.

5. Further Investigation and the DCFS Jurisdiction/Disposition Report

When Mother was interviewed on September 23, 2016, Mother admitted she had not smoked marijuana because she felt nauseous, but because she had a "weakness" for it. She stated her drug of choice was alcohol and needed it "to get the edge off." Mother stated she drank alcohol and smoked marijuana with Father. Mother reported she did not want to attend an inpatient substance abuse program because she did not want to be away from her children for six months, but that she was on a waiting list for such a program. Mother visited with the infants daily, monitored by MGM, with each visit approximately two to three hours.

On September 26, 2016, Mother missed her scheduled drug and alcohol test with DCFS, and instead provided a separate program's drug test for a limited number of substances, not including alcohol.

On October 4, 2016, in its "Jurisdiction/Disposition Report" for the hearing on October 13, 2016, DCFS recommended the court sustain the section 300 petition, declare the infants dependents of the court, continue

their detention with MGM, order family reunification services for the parents, and order that their visitation remain monitored.

6. The Jurisdiction and Disposition Hearing and Appeal

On October 13, 2016, the court sustained the allegations of the petition, including that "[s]ubstantial danger exists to the physical health of [the infants] . . . and there is no reasonable means to protect [them] without removal from parent's . . . physical custody."

The court also ordered that DCFS assess whether Mother may be allowed to move into the home of MGM to reside with the infants; DCFS was to report to the court concerning this matter at a progress hearing to be held on January 12, 2017.[6]

With regard to disposition, Mother's counsel argued on the record that there was not clear and convincing evidence the infants should remain out of Mother's care. The infants' appointed counsel opposed their return to Mother because, while Mother had already been enrolled in substance abuse programs, she had shown continued evidence of substance abuse, and because of Mother's long history of substance abuse. Counsel for DCFS concurred with the infants' appointed counsel, and argued "safety measures are already filed for the mother and there is evidence before the court today to show that she would not abide by those safety measures."

On October 13, 2016, the juvenile court ordered the infants removed from parental custody and ordered parental unification services for Mother, including a full drug/alcohol program with random testing, a parenting education class, individual counseling, and monitored visits. The matter was scheduled for a January 12, 2017 progress hearing to address the possibility

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[6] Two of the three appellate briefs in this matter, including appellant's reply brief, were filed after the date stated in the text; we derive from that the inference that this appeal is not moot.

of returning the infants to parental custody or liberalizing visitation, and a six-month review hearing on April 13, 2017.[7]

Mother filed this timely appeal on October 17, 2016.

CONTENTIONS

Mother contends substantial evidence did not support the trial court's order removing the infants from her physical custody and placing them with MGM; instead, the court should have released the infants to Mother on specified conditions. We agree with DCFS that the juvenile court's dispositional order was supported by substantial evidence; accordingly, we affirm.

DISCUSSION

A. Applicable Law

Section 361, subdivision (c)(1) limits the ability of the juvenile court to remove a child from the physical custody of his or her parents. To do so, the juvenile court must find by clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor . . . and there are no reasonable means by which the minor's physical health can be protected . . . ." This is a heightened standard of proof from the required preponderance of evidence standard for taking jurisdiction over a child. (§§ 300, 355, subd. (a); *In re Basilio T.* (1992) 4 Cal.App.4th 155, 169, limited on other grounds in *In re Cindy L.* (1997) 17 Cal.4th 15, 31-35.) "The high standard of proof by which this finding must be made is an essential aspect of the presumptive,

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[7] Any results of these hearings is not in the record. Counsel for Mother states without record citation in Mother's January 18, 2017 brief that on January 12, 2017, "all previous orders were left in full force and effect." We have no indication of any pending appeals or writ proceedings other than this appeal.

constitutional right of parents to care for their children." (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525; see also *In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288.) "Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 695.)

At the same time, jurisdictional findings are prima facie evidence the child cannot safely remain in the home. (§ 361, subd. (c)(1).) "The parent need not be dangerous" and the child "need not have been actually harmed before removal is appropriate." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6; see also *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.)

The standard of review of a dispositional order on appeal is substantial evidence, "bearing in mind the heightened burden of proof." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654; see also *In re R.V.* (2012) 208 Cal.App.4th 837, 849.)

It is appellant who has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings or orders. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) On appeal, we do not pass on the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we review the record in the light most favorable to the juvenile court's order to decide whether substantial evidence supports the order. (*In re Isayah C., supra,* 118 Cal.App.4th at p. 694; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581 [on appeal we "'have no power to judge the effect or value of the evidence, to weigh the evidence [or] to consider the credibility of witnesses . . . .' [Citation.]"].)

"In making [our] determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court. [Citation.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

B. Analysis

Substantial evidence supported the removal order.

Mother used marijuana while pregnant, disobeyed several orders which were conditions on the placement of the infants in her care, and has a two-decade-plus history of drug and alcohol abuse. Exposing her unborn children to the drug demonstrated a lack of concern for her children's health, and was substantial evidence of a material risk of harm to the infants once born. "[A] child's ingestion of illegal drugs constitutes 'serious physical harm' for purposes of section 300." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 825.)

As the court in *In re Christopher R.* explained, a mother's use of cocaine during the last months of pregnancy "confirmed her poor judgment and willingness to endanger her children's safety due to substance abuse." (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219.) While marijuana clearly is not cocaine, Mother's routine use of it during this pregnancy exposed Mother's unborn twin daughters to a harmful foreign substance and demonstrated Mother's poor judgment and willingness to endanger her unborn children. Mother's breastfeeding one of her infants after consuming multiple beers violated two conditions of the placement of the infants with her.

Children of "tender years," like the infants in this case, face "an inherent risk to their physical health and safety" if they are not adequately cared for or supervised. (*In re Rocco M., supra,* 1 Cal.App.4th at p. 824.) In

matters involving young children, a "finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767.)

In addition, Mother has an unfortunately lengthy history of substance abuse, of 23 years' duration, characterized by use of various drugs and a likely addiction to alcohol. Past conduct can be probative of current conditions, or of future risk of serious physical harm to her infants. (See *In re S.O.* (2002) 103 Cal.App.4th 453, 460-461.)

Further, in this case reasonable efforts were made to avoid removal of the infants from Mother's care. The initial section 300 petition was a non-detention petition with Mother initially allowed to retain custody of the infants. She was also ordered to continue drug and alcohol testing, not to consume or be under the influence of drugs or alcohol, and not to breastfeed the infants unless DCFS approved. She did not comply with these reasonable conditions. In addition to the violations stated above, she provided diluted substance tests to DCFS, missed at least one scheduled drug and alcohol test, and took an unprescribed Xanax pill. Additionally, some of these events occurred after Mother had enrolled in an outpatient substance abuse rehabilitation program.

Mother's disobedience to orders made as part of the court's effort to enable the infants to remain in her custody validate the court's October 13, 2016 order removing the infants from her care. Mother's claim that conditions such as DCFS continuing random home visits suggested in her brief in this court are legally insufficient—and factually refuted by her conduct—to meet her burden on appeal.

Indeed, Mother's argument that the "juvenile court may consider the parent's past conduct and current circumstances" in determining custody of the dependent children, citing *In re Maria R.* (2010) 185 Cal.App.4th 48, 70, leads inexorably to the conclusion that Mother continues to be a threat to the well-being and safety of her twin daughters and supports the removal order from which Mother appeals.[8]

In sum, substantial evidence supported the juvenile court's order of October 13, 2016.

DISPOSITION

The removal order is affirmed.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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[8] Mother's reliance on *In re Henry V.*, *supra*, 119 Cal.App.4th 522, is misplaced. The circumstances in that case stand in contrast to the circumstances here. While the *In re Henry V.* court found that there was no substantial evidence to support removal of the child from the parent, in this case, the removal was ordered only after Mother violated numerous conditions on the placement of the infants with her. Instead of providing a safe environment for her infants, she engaged in the miscreant behavior described in the text, *ante*. Given those violations of court orders, and her history of substance abuse, her reliance on *In re Henry V.* and other cases is unpersuasive.

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.